

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH 'A', CHANDIGARH

श्रीमती दिवा सिंह, न्यायकि सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE SMT.DIVA SINGH, JUDICIAL MEMBER
AND SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.921/Chd/2018**

निर्धारण वर्ष / Assessment Year : 2016-17

Sh.Gaurav Jain, 9-A, Aggar Nagar, Ludhiana. Punjab.	बनाम	The D.C.I.T., Central Circle-1, Ludhiana.
स्थायी लेखा सं./PAN NO: AEWPJ5715M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.923/Chd/2018**

निर्धारण वर्ष / Assessment Year : 2016-17

Sh.Deepak Kumar S/o Sh.Rameshwar Dass, 9-A, Aggar Nagar, Ludhiana. Punjab.	बनाम	The D.C.I.T., Central Circle-1, Ludhiana.
स्थायी लेखा सं./PAN NO: ABVPK9859M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.916/Chd/2018**

निर्धारण वर्ष / Assessment Year : 2016-17

&

आयकर अपील सं./ **ITA No.1237/Chd/2018**

निर्धारण वर्ष / Assessment Year : 2015-16

M/s Big Digs Resorts Ltd., 53-A, Aggar Nagar, Ludhiana. Punjab.	बनाम	The D.C.I.T., Central Circle-1, Ludhiana.
स्थायी लेखा सं./PAN NO: AABCB6348N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri Ashwani Kumar, CA
राजस्व की ओर से/ Revenue by: Shri Hemant Gupta, Sr.DR
सुनवाई की तारीख/Date of Hearing : 30.07.2019
उद्घोषणा की तारीख/Date of Pronouncement:26.08.2019

आदेश/ORDER

PER BENCH:

All the above appeals have been preferred by different assesseees against the separate orders of the Commissioner of Income Tax (Appeals), Patiala [(in short 'CIT(A)'] dated 28.5.2018, 28.5.2018,10.8.2018 and 28.5.2018, passed u/s 250(6) of the Income Tax Act, 1961 (hereinafter referred to as 'Act'), relating to assessment years 2016-17, 2016-17, 2015-16 and 2016-17 respectively.

2. It was the common ground that the issue involved in all the appeals was identical, arising from identical facts and circumstances. Therefore, these were heard together and are being disposed off by this common consolidated order. It was pointed out that the issue involved in all the appeals related to levy of penalty u/s 271AAB of the Act on the income surrendered consequent to search action carried out on Maharaja Group of cases to which all the above assesseees belonged. It was stated that consequent to search and seizure operations conducted on the assesseees u/s 132(1) of

the Act on 27.8.2015, the following incomes had been surrendered by the assessee in the statement recorded u/s 132(4) of the Act as under:

1) Gaurav Jain, ITA No.921/Chd/2018	= Rs.80 lacs
2) Deepak Kumar, ITA No.923/Chd/2018	= Rs.75 lacs
3) M/s Big Digs Resorts Ltd., ITA No.1237 & 916/Chd/2018 (A.Y. 2015-16 & 2016-17)	= Rs.150 lacs

3. Penalty proceedings u/s 271AAB of the Act were thereafter initiated, in response to which the assessee submitted that firstly the levy was not mandatory and the assessee having included the surrendered income in its return of income, substantiated the manner of earning such undisclosed income, due taxes alongwith interest having been paid and return filed on time as per the provisions of section 139(1) of the Act, no penalty was leviable. The AO considered the reply of the assessee but did not find it tenable. He noted that the surrender was offered as business income to cover up discrepancies found in the seized documents during search and any discrepancy in the books of account and related to income yet to be recorded in the books of account. He, therefore, held that the surrendered income qualified as undisclosed income as per the provisions of section 271AAB(3)(c)(ii) of the Act. Accordingly he levied penalty @ 10% of the undisclosed

income in all the impugned cases. The Ld.CIT(A) upheld the order of the AO.

4. Aggrieved by the same, the impugned appeals have been filed before us, raising common grounds in all the appeals. For the sake of convenience, we are reproducing the grounds raised in the appeal of Sh.Gaurav Jain in ITA No.921/Chd/2018 as under:

“That the order passed u/s 250(6) of the Income Tax Act, 1961 by the Ld. Commissioner of Income Tax(Appeals)-5, Ludhiana is against law and facts on the file in as much as he was not justified to arbitrary uphold the penalty levied u/s 271AAB at Rs.8,00,000/-.”

5. At the outset itself, the Ld.Counsel for the assessee pointed out that the matter relating to levy of penalty u/s 271AAB of the Act in the case of other assesseees of the group, had travelled to the I.T.A.T., who had deleted the same vide their order in ITA No.1238 to 1242/Chd/2018 dated 12.7.2019. It was pointed out that the I.T.A.T. had adjudicated the issue in the case of other assesseees in the group, being Smt.Rama Rani, Smt.Veena Rani, Shri Sukhdarshan Kumar and M/s R.D.Palace Pvt. Ltd. vide the aforesaid order. Copy of the order was placed before us and our attention was drawn to the findings of the I.T.A.T. at pages 23 to 26 of the order as under:

9. From the perusal of the above decision, it can be noticed that the Tribunal has categorically held that if no incriminating material is found during the search action and the surrendered income does not fall in the definition of undisclosed income as defined u/s 271AAB of the Act, the penalty is not warranted. The Coordinate Bench of the Tribunal has also discussed the proposition of law laid down by the Hon'ble Allahabad High Court in the 'Principal CIT vs Sandeep Chandak and Ors.' (supra) and has held that the facts of the said case are distinguishable and do not apply to the facts of the case in which no incriminating material is found during the search action.

10. However,, Ld. Counsel for the assessee has been fair enough to admit that it is not in all the cases that no incriminating material was found. That certain items of jewellery of silver were found / noticed during the search action, the source of income from which as held by the Assessing Officer also stood explained and also the manner of earning of the income was also substantiated. He, therefore, has been fair enough to admit that penalty under the provisions of section 271AAB (1)(a) of the Act was liable to be confirmed to the extent of the property / material found during search action. He, in this respect has given a chart, which for the sake of ready reference, is reproduced as under:-

S.No.	Particulars	Sukhdarshan Kumar	Rama Rani	Venna Rani	R.D. Place Private Limited
1	Jewellery	0	133	54.23	0
2	Silver	0	0	8.40	0
3	Income Declared	230	67	27.37	300
Total		230	200	190	300

11. In the case of Mrs. Rama Rani, (ITA No. 1240/Chd/2018) for assessment year 2016-17, as noted from the above chart, jewellery worth Rs. 1.33 crores was found, whereas, income surrendered by

her during the search action was of Rs. 2 crores. In view of the discussion made above, the penalty us 271AAB(1)(a) of the Act is restricted to the value of the jewellery found during search action i.e. Rs. 1.33 crores, the 10% of which comes to Rs. 13.30 lacs, hence, the penalty in the case of Mrs. Rama Rani is restricted to Rs. 13.30 lacs as against Rs. 20 lacs imposed by the Assessing Officer.

12. Similarly, in the case of Mrs. Veena Rani (ITA No. 1238/Chd/2018) for assessment year 2016-17, the total income surrendered was of Rs. 1.90 crores, whereas, the jewellery found during search action was of the value of Rs. 54.23 lacs and silver found of Rs. 8.40 lac. Hence, the penalty leviable on the aforesaid gross amount of 6.263 lacs (Rs. 54.23 lcs + Rs. 8.40 lacs), which is calculated @ 10% at Rs. 6.263 lacs. Hence, the penalty is calculated and restricted to Rs. 6.263 lacs in this case.

13. In the case of Sudkharan Kumar in ITA No. 1239/Chd/2018 for the assessment year 2016-17, neither any incriminating material nor valued property was found, hence, no penalty in this case under the provisions of section 271AAB (1)(a) of the Act is exigible. The penalty in this case is ordered to be deleted.

14. Now coming to the cases of M/s R.D. Palace Pvt. Ltd, Ludhiana in ITA Nos.1241 & 1242/Chd/2018 for the assessment years 2015-16 and 2016-17, since, no incriminating material or valued property was found in these cases and further no unaccounted property was found during the search action, hence, the penalty is not leviable in these cases and the same is accordingly ordered to be deleted.”

6. Referring to the same it was pointed out that the I.T.A.T. had held that no penalty u/s 271AAB of the Act was leviable, if no incriminating material was found during the search action since the surrendered income would not fall in the definition of ‘undisclosed income’ as defined u/s 271AAB

of the Act. Thereafter, drawing our attention to paras 10 to 14 of the order as reproduced above, it was pointed out that in each case before the I.T.A.T., on the basis of a chart produced by the assessee before it disclosing the nature of surrender made being on account of jewellery or silver found or income declared, the I.T.A.T. confirmed the levy of penalty on the income surrendered relating to jewellery and silver found holding that the same being incriminating material constituted undisclosed income for the purpose of levy of penalty u/s 271AAB of the Act. While the surrender made on account of "Income declared", in the absence of any incriminating material to support it, was held not to be in the nature of undisclosed income and hence not liable to penalty and, therefore, accordingly penalty on the surrender made on account of Income declared in all the cases was deleted by the I.T.A.T. The Ld.Counsel for the assessee thereafter pointed out that the impugned cases related to rest of the assessees/persons belonging to the group searched and the facts were identical with the surrender in the impugned cases also, being made on account of incriminating material found being wrist watches and also on account of income declared. A chart bifurcating the income surrendered as above in each case was filed before us as under:

S.No.	Particulars	Deepak Kumar	Gaurav Jain	Big Digs Resorts Private Limited
1	Jewellery	0	0	0
2	Silver	0	0	0
3	Wrist Watches	3.42	1.75	0
4	Income declared	71.58	78.25	150
Total		75	80	150

7. The Ld.Counsel for the assessee contended, therefore, that the issue being identical to that in the appeals decided by the I.T.A.T. as aforesaid. It was squarely covered by the said decision.

8. The Ld. DR at this juncture rebutted by pointing that the contention of the Ld.Counsel for the assessee that no incriminating material was found for the surrender made on account of "Income declared" was incorrect. He drew our attention to the statement administered on oath by Shri Sukhdarshan Kumar during search on the group, as under:

Q.13. Please explain the contents of page 1 to 49 of Annexure AA-5 seized from Hotel Maharaja Regency today on 24.09.2015 during the operation of P.O. (prohibitory order) at this premises of M/s R.D. Palace Pvt (Hotel Maharaja Regency).

Ans. This diary contains some commodity transactions and property related transactions related to my family members as I am looking after the financial matters of my family and

my younger brother Sh.Deepak Kumar's family.

Q.14. Please tell about the exact nature of contents written in this diary?

Ans. The pages of this diary contain details of some transactions from sauda related to gold/silver, properties and some other commodities. It also includes the gifts received by various family members.

Q.15. Please tell whether these transactions are investments or profit/loss from sauda as stated by you while replying to Q.14.

Ans. As per my memory most of the transactions are related to profit/loss. However, there may be chances of investment in jewellery also.

Q.16. While reply to Q.15 you have stated that most of the transactions are related to profit/loss. Please explain the nature of such transactions and also that with whom these were made.

Ans. Most of these transactions are profit/loss earned from commodities, properties and gifts received. I don't remember the names of the persons with whom these transactions were made.

Q.17. Mr.Sukhdarshan Kumar it appears that you have maintained the detail of these transactions systematically and person wise. However, still you are saying that you are not remembering the names with whom you had made these transactions.

Ans. I do not remember the names of the person with whom these transactions have been made.

Q.18. *Are these transactions routed through the normal books of accounts of all the family members?*

Ans. *Yes, I think so.*

Q.19. *Please explain what do you mean by "I think so"?*

Ans. *Sir, these transactions are not recorded in the regular books of accounts.*

Q.20. *Are these transactions routed through the banking channel?*

Ans. *No sir, I think these are the transactions related to profits earned in cash from sale and purchase of properties, commodities, bullion etc.*

Q.21. *Do you mean to say that the transactions recorded in the diary annexed as annexure AA-5 are unrecorded transactions and is the undisclosed income of your's and your family members?*

Ans. *Yes Sir.*

Q.22. *Please explain the modus operandi of how you and your family members have earned these profits?*

Ans. *Sir, generally there is not a set pattern as such. Sometimes with the help of some known persons, friends we get to know of some good property deals wherein the seller of the properties are in dire need of funds and are ready to sell the property at much below the real market price. In those cases without getting the properties actually registered in our names, we do make further sales by getting cash profits on these transactions without routing them through our regular books of accounts. These profits are further reinvested to earn profits on other property transactions, commodity transactions and on trading in bullion.*

Q.23. *Please tell the names of persons with whom you and your family members have entered into these transactions.*

Ans. *I do not remember the names of the persons.*

Q.24. *Please do consult with our family members who have also entered into such transactions. They might be remembering the names of the persons with whom such transactions have been made.*

Ans. *I would like to submit here that these kind of transactions were done by my family members after consulting me and through me only.*

Q.25. *How is it possible that you and your family members have earned huge profits during the current financial year?*

Ans. *We have also incurred certain losses on such transactions.*

Q.26. *The annexure AA-5, as mentioned above, shows only the profits earned from such transactions. How can you say that there were losses also?*

Ans. *It appears that the losses incurred have not been noted.*

Q.27. *Please explain whether you have earned cash profits from your business concerns also.*

Ans. *There were certain functions which were organized during the FY 2014-15. These relate to transactions mentioned on the documents impounded from the premises of M/s Kothari Resorts on 28.08.2015 as annexure A-10 & A-11. These appear to be the transactions where the customers did not take the bills.*

Q.28. *Please substantiate these transactions with your regular books of accounts.*

Ans. Sir, I am not in a position to substantiate the same at this moment.

Q.29. Please explain why not these transactions be treated as undisclosed as you are not able to substantiate the same with your regular books of accounts?

Ans. Sir, I am not in a position to substantiate the same at this moment.

Q.30. As per the Annexure AA-5, as mentioned above, the profits earned by you and your family members are as under:-

<i>S.No.</i>	<i>Name</i>	<i>Amount (in Rs. lacs)</i>
1	<i>Sukhdarshan Kumar</i>	<i>267.69</i>
2	<i>Rama Rani</i>	<i>190.16</i>
3	<i>Rajat Jain</i>	<i>71.62</i>
4	<i>Vani Jain</i>	<i>81.24</i>
5	<i>Deepak Kumar</i>	<i>70.42</i>
6	<i>Veena Rani</i>	<i>176.84</i>
7	<i>Gaurav Jain</i>	<i>7 6.17</i>
8	<i>Shweta Jain</i>	<i>84.40</i>
9	<i>Saurav Jain</i>	<i>75.35</i>
10	<i>Niti Jain</i>	<i>78.50</i>

Further, your companies/firms have not recorded certain transactions in its regular books of accounts as has been pointed above. I am explaining to you the provisions of section 132(4) of the Act and relevant provisions of penalty u/s 271AAB of the Act. Do you want to say anything in this regard?

Ans. As submitted earlier, the profits earned by the individuals are those derived from the unaccounted and undisclosed transactions from sale and purchase of properties, bullion and commodity trading etc. during the current financial year i.e. FY 2015-16. These also include certain receivables on account of profits

earned from the sale of properties etc. Some of these profits have been utilized to purchase gold jewellery and kept as cash etc. which has been seized earlier by the Income tax department during the course of search from our residential premises and from the lockers. Some profits have been utilized for household expenditure etc. and also as temporary advances, the details of which are not available at this moment. However, in order to avoid any prolonged litigation and to buy peace of mind, I on behalf of my family members offer to disclose additional income of Rs.17.00 cr. The details of which are as under:-

S.No.	Name	Amount (in Lacs) FY 2014-15	Amount (in Lacs) FY 2015-16
1	M/s R.D.Palace Pvt. Ltd.	200	100
2	M/s Big Digs Resorts Ltd.	100	50
3	M/s Maharaja Light & Tent Service	-	50
4	Sukhdarshan Kumar	-	230
5	Rama Rani	-	80
6	Rajat Jain	-	200
7	Vani Jain	-	90
8	Deepak Kumar	-	75
9	Veena Rani	-	190
10	Gaurav Jain	-	80
11	Shweta Jain	-	90
12	Saurav Jain	-	80
13	Niti Jain	-	85
	Total	300	1400

The additional income in the hands of the entities mentioned at "Sr.No.1 to 3 above is as a result of certain unaccounted business transactions such as unaccounted receipts, inflation of expenditure etc. As regard persons/individuals mentioned at Sr.No.4 to 13, the additional income is as a result of unaccounted transactions of

*purchase/sale of properties,
shares/commodities, gold/silver/
bullion and receipt of gifts. It is
further submitted the additional
income so offered for the respective
assessment years as mentioned
above is over and above the normal
income of the above mentioned
entities/individuals.”*

9. Referring to the same the Ld. DR firstly conceded that he was not in possession of the original statement and had managed to procure only a copy of the same on whatsapp. He further stated that it was evident from the above that the surrender was specific on account of unaccounted transactions of properties and commodities which were revealed by way of entries noted in a diary seized during search being Annexure AA-5. Ld.DR therefore contended that there was no doubt that the surrender was in the nature of undisclosed income and penalty therefore had been rightly levied on the same. The Ld. DR further pointed out that in the facts, as noted in the case of other assessee's order wherein penalty on Income declared had been deleted by the ITAT as pointed out by the Ld.Counsel for the assessee, it was noted that the Ld. DR could not controvert the contention of the assessee that other than jewellery and silver, etc. no other incriminating material was found during search

action. It was contended that for this reason the I.T.A.T. had held that no penalty was leviable on the income declared in those cases u/s 271AAB of the Act.

10. The Ld.Counsel for the assessee, at this juncture rebutted by stating that since no books of account were maintained by the impugned assessees, there was no question of any income not recorded in its books and, therefore, no question of any undisclosed income for the purpose of levy of penalty u/s 271AAB of the Act. He further emphasized his reliance on the decision of the I.T.A.T. in the case of other assessees relating to the group.

11. We have heard the rival contentions, carefully perused the orders of the authorities below and also considered the various documents referred to before us. The issue before us relates to levy of penalty u/s 271AAB of the Act.

12. As per section 271AAB, penalty is levied on the undisclosed income found during search and the quantum of penalty varies from 10% to 30% of the undisclosed income, depending upon fulfillment of certain conditions by the assessee as specified in the section. The term "undisclosed income" has been

defined in the Explanation to section 271AAB of the Act, as under:

“271AAB

“(c) “undisclosed income” means----

- (i) *Any income of the specified previous year represented either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of search under section 132, which has-----*
 - (A) *Not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or*
 - (B) *otherwise not been disclosed to the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or*
- (ii) *any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in he books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.”*

13. Ld.Counsel for the assessee has contended that in the case of other assesses belonging to the same group searched and where identical penalty u/s 271AAB of the Act had been levied, the ITAT had deleted the penalty levied on interpreting the definition of undisclosed income as meaning

unaccounted income represented by incriminating material being found during search which was absent in the said cases. The Ld. Counsel has contended that the issue in the present cases is covered by the said decision of the ITAT. The Ld. DR, on the other hand, has stated that there was incriminating material relating to "income declared " during search and has referred to the statement recorded of one Sh. Sukhdarshan Kumar during search wherein, he has pointed out, that the income relating to which surrender has been made has been found recorded in a diary seized during search and its nature has been specifically stated in the statement recorded.

14. Considering the above facts and circumstances of the case and the fact that the statement referred to by the Ld.DR of Sh. Sukhdarshan Kumar was not available in original, We consider it fit to restore the issue back to the Ld.CIT(A) with the direction to obtain the original copy of the statement recorded of Sh.Sukhdarshan Kumar and thereafter adjudicate the issue afresh. The Ld.CIT(A) may consider all other aspects as he deems fit and thereafter decide the issue in accordance with law. Needless to add the assessee be granted adequate opportunity of hearing.

15. In the result, all the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the Open Court.

Sd/-

दिवा सिंह

(DIVA SINGH)

न्यायिक सदस्य/Judicial Member

दिनांक /Dated: 26th August, 2019

रती

Sd/-

अन्नपूर्णा गुप्ता

(ANNAPURNA GUPTA)

लेखा सदस्य/Accountant Member

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar